

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAIN WELLS FARGO HOME MORTGAGE
OVERTIME PAY LITIGATION

No. MDL 06-1770 MHP

This Document Relates To:

ALL ACTIONS

MEMORANDUM & ORDER
Re: Nationwide Plaintiffs' Motion to
Certify a Class and Collective Action

This multidistrict litigation arises from three putative collective actions and one putative class action against defendant Wells Fargo Home Mortgage (“defendant” or “Wells Fargo”) on behalf of defendant’s Home Mortgage Consultants (“HMCs”). Now before the court is the nationwide¹ plaintiffs’ motion for class certification pursuant to Federal Rule of Civil Procedure 23, and for collective action certification pursuant to the Fair Labor Standards Act (“FLSA”). After considering the parties’ arguments and submissions and for the reasons set forth below, the court rules as follows.

BACKGROUND

Plaintiffs in this MDL proceeding are current and former HMCs employed by Wells Fargo from February 2001 to the present. The nationwide plaintiffs seek certification of two classes. First, plaintiffs seek to certify a class of Home Mortgage Consultants who worked nationwide, but not in California, pursuant to Federal Rule of Civil Procedure 23 to pursue claims for restitution under California’s Unfair Competition Law, Cal. Bus. & Prof. Code sections 17200 et seq. (“UCL”).

1 Second, plaintiffs seek to certify a nationwide collective action of non-California HMCs who
2 affirmatively opt in to this case to pursue claims for damages under the Fair Labor Standards Act, 29
3 U.S.C. section 216(b) (“FLSA”). The UCL provides a vehicle for recovery of restitution predicated
4 on an alleged violation of the FLSA.

5 Wells Fargo is a world-wide financial services company, with its headquarters in San
6 Francisco, California. Hanson Dec., Exh. 1; Strother Dep. at 32:18–33:10; Meuers Dep. at
7 168:19–170:2. Wells Fargo is subject to the requirements of the FLSA. Cahalan Dep. at 81:9–20.
8 The exemption status of each position within Wells Fargo is determined by the Corporate
9 Compensation department and the in-house legal department based on the duties and responsibilities
10 of the position. Hanson Dec., Exhs. 6 & 7.

11 “Home Mortgage Consultant” is the title given to Wells Fargo employees who sell
12 mortgages. Wells Fargo employs approximately 10,000 HMCs nationwide, and may have employed
13 as many as 25,000 total over the past five years. Blackwell Dep. at 38:9; Heiden Dep. at
14 25:8–26:11. Approximately 20% of HMCs are employed in California. HMCs are classified
15 according to specialty. Approximately 90–95% of HMCs are designated as “prime” or “sub-prime,”
16 while the remaining HMCs are classified as “reverse,” “emerging markets,” “renovation” and
17 “builder.” Cahalan Dep. at 34:25–35:16. Plaintiffs claim that regardless of any variations among
18 HMC classifications, all Wells Fargo HMCs have the same basic job duties and share virtually
19 identical job descriptions. Hanson Dec., Exhs. 10–13; Heiden Dep. at 62:24–63:1.

20 The primary duty of all HMCs is to sell mortgage loan products. Plaintiffs claim that HMCs
21 spend virtually all of their time in a Wells Fargo office while performing their sales duties, primarily
22 through the use of office telephones and computers. Additionally, plaintiffs claim that HMCs spend
23 considerable time engaged in clerical tasks associated with loan processing. Ashworth Dec. ¶¶ 3–5,
24 8–9; Bowne Dec. ¶¶ 3–5, 8–9; Dees Dec. ¶¶ 3–5, 7–8; Duncan Dec. ¶¶ 3–5, 8–9; Fitzgerald Dec. ¶¶
25 3–5, 8–9; Grabow Dec. ¶¶ 3–5, 8–9; Hardy Dec. ¶¶ 3–5, 8–9; Hayes Dec. ¶¶ 3–5, 8–9; Lee Dec. ¶¶
26 3–5, 8–9; Lovrien Dec. ¶¶ 3–5, 8–9; Lunde Dec. ¶¶ 3–5, 8 & 10; Madsen Dec. ¶¶ 3–5, 8–9; Magott
27 Dec. ¶¶ 3–5, 8–9; Pejoves Dec. ¶¶ 3–5, 8–9; Sykes Dec. ¶¶ 3–5, 8–9; Tugel Dec. ¶¶ 3–5, 8–9;

1 Valdez Dec. ¶¶ 3–5, 8–9. The court notes that each of plaintiffs’ seventeen declarations are
2 substantially identical in format and wording.

3 All HMCs are paid pursuant to the same basic compensation policy, whereby they receive
4 commissions on the mortgage loans they sell. Cahalan Dep. at 39:16–17; 168:2–170:1. On January
5 1, 2005, Wells Fargo began paying HMCs a minimum “draw” of at least \$2,000 per month. Cahalan
6 Dep. at 39:23–41:16. Prior to that time, there was no guaranteed minimum compensation for HMCs.
7 Id. at 41:2–6. Wells Fargo classifies all HMCs as “exempt” from the overtime requirements of the
8 FLSA, and no records are kept of the amount of hours HMCs work. Cahalan Dep. at 57:22–58:13,
9 90:9–11; Blackwell Dep. at 86:12–20. Plaintiffs claim that HMCs commonly work more than forty
10 hours per week without additional overtime compensation. Ashworth Dec. ¶¶ 7–11; Dees Dec. ¶¶
11 6–8, 10–11; Duncan Dec. ¶¶ 7–11; Fitzgerald Dec. ¶¶ 7–11; Grabow Dec. ¶¶ 7–11; Hardy Dec. ¶¶
12 7–11; Hayes Dec. ¶¶ 7–11; Lee Dec. ¶¶ 7–11; Lovrien Dec. ¶¶ 7–11; Lunde Dec. ¶¶ 7–11; Madsen
13 Dec. ¶¶ 7–11; Magott Dec. ¶¶ 7–11; Pejoves Dec. ¶¶ 7–11; Sykes Dec. ¶¶ 7–11; Tugel Dec. ¶¶
14 7–11; Valdez Dec. ¶¶ 7–11.

15 In response to plaintiffs’ seventeen HMC declarations, defendant has submitted sixty-seven
16 declarations from other HMCs purporting to show a wide variety in employment experiences.
17 Among defendant’s declarants, the time spent working outside a Wells Fargo office ranges from
18 5–10% to nearly 100% of total time worked, depending upon a variety of factors related to each
19 individual HMC. Carrello Dec. ¶ 3; Chatraw Dec. ¶ 3; Hailey Dec. ¶ 9; Lesch Dec. ¶ 3; Maggio
20 Dec. ¶ 4; Meirick Dec. ¶ 4; Pareigis Dec. ¶ 4; Ponzo Dec. ¶ 3; Reynolds Dec. ¶ 5; Schroeder Dec. ¶
21 3; Sierra Dec. ¶ 3; Skalicky Dec. ¶ 5; Smith Dec. ¶ 3. A similar range appears regarding the
22 frequency with which HMCs are able to meet with their clients in person, and the amount of time
23 spent meeting with clients. Drover Dec. ¶ 9; Elliott Dec. ¶ 7; Gallet Dec. ¶ 5; George Dec. ¶ 6;
24 Horton Dec. ¶ 5; Hanson Dec. ¶ 3; Lopez Dec. ¶ 4; Muir Dec. ¶ 6; Reynolds Dec. ¶ 3; Shaffer Dec. ¶
25 5. Additionally, defendant disputes plaintiffs’ claim that HMCs spend a considerable amount of
26 time on clerical tasks, asserting that HMCs who handle a high volume of loans have clerical
27 assistants and that any office tasks performed by HMCs are performed directly in connection with
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1 loan originations. Bennett Dec. ¶ 4; Boyd Dec. ¶ 6; Chatraw Dec. ¶ 11; Clark Dec. ¶ 4; Cook Dec. ¶
2 4; Corey Dec. ¶ 10; Gerhardt Dec. ¶ 17; Hanson Dec. ¶ 10; Nunez Dec. ¶ 4; Roppa Dec. ¶ 11;
3 Sprague Dec. ¶ 4; Steiger Dec. ¶ 2; Westman Dec. ¶ 13; Zeller Dec. ¶ 4. In terms of total hours
4 worked, defendant's declarations show a range of thirty to sixty-five hours per week, in contrast to
5 plaintiffs' assertion that HMCs commonly work more than forty hours per week. Redfern Dec. ¶ 10;
6 Scripter Dec. ¶ 9; O'Brien Dec. ¶ 12; Person Dec. ¶ 13; Smith Dec. ¶ 3. As with the California
7 HMCs, defendant asserts that these variations in job experiences arise from the varying product
8 specializations among nationwide HMCs. Blackwell Dec. ¶¶ 4–15. Additional factors affecting
9 work experience include geographic location, work style preferences, compensation objectives,
10 experience, target market and market forces.

11 Defendant also attacks the reliability of plaintiffs' declarations on a number of grounds.
12 First, defendant cites the similarities and uniformity in the language among the seventeen
13 declarations, suggesting that they are "cookie-cutter" declarations that do not reveal the true
14 experiences of the purported declarants. Second, defendant asserts that nearly all of the declarations
15 come from two offices in the Midwest, and therefore do not represent the 1,600 nationwide offices.
16 Defendant additionally asserts that the declarants lack foundation to opine on the job duties of loan
17 originators other than themselves. Finally, defendant notes that six of the seventeen declarants
18 worked most or all of their time in a refinance center in Des Moines that was established to take
19 advantage of a temporary refinance market, and therefore plaintiffs' declarations are not
20 representative of Midwest HMCs either.

21 Defendant further claims that current HMCs prefer their current commission-based
22 compensation system, regardless of specialization, and therefore would not benefit from a class
23 action. Ford Dec. ¶ 4. In response to this, plaintiffs assert that the aim of this litigation is not to do
24 away with Wells Fargo's current commission system, but only to bring the commission system in
25 line with the requirements of the FLSA by establishing record-keeping practices and overtime
26 compensation.

27 Additionally, plaintiffs attack the reliability of defendant's declarations, claiming that
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1 declarations from current employees of a defendant are inherently unreliable and possibly coerced.
2 In a previous order in this litigation, this court noted the “heightened potential for coercion because
3 where the absent class member and the defendant are involved in an ongoing business relationship,
4 such as employer-employee, any communications are more likely to be coercive.” Mevorah v.
5 Wells Fargo Home Mortg., Inc., No. C 05-1175 MHP, 2005 WL 4813532 (N.D. Cal. Nov. 17, 2005)
6 (Patel, J.) (quoting Belt v. Emcare Inc., 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003)).

7 Reviewing the declarations as a whole, there are glaring reliability concerns on both sides.
8 Plaintiffs’ declarations represent a very small portion of the full range of HMCs and Wells Fargo
9 locations, and are nearly identical in terms of language and substance. Defendant’s declarations,
10 though drawn from a wider sample of Wells Fargo employees and offices, are likewise selectively
11 presented and carry within them possible pressure arising from ongoing employment relationships.
12 It is unremarkable to conclude that both sets of declarations are litigation-driven, and drafted and
13 selected to advance a preferred characterization of the facts. All declarations have therefore been
14 carefully scrutinized.

15 Even taking these credibility concerns into consideration, however, certain key undisputed
16 and undeniable facts arise. First, it is clear that, from Wells Fargo’s perspective, all HMCs are
17 treated exactly the same way in terms of exemption status and compensation. Additionally, the
18 basic function and job description of each HMC is substantively identical—each HMC is charged
19 with selling home mortgages to consumers, with certain differences arising based on the target
20 customer base. Thus, from the perspective of Wells Fargo, there are substantial similarities in the
21 manner in which HMCs are treated, and the manner in which their duties are designated.

22 From the perspective of individual HMCs, however, there are differences in day-to-day
23 activities and overall employment experiences that cannot be ignored. Within the basic HMC
24 framework, HMCs are given a great deal of flexibility and autonomy in terms of work style and the
25 amount of time they spend working. Though selectively chosen, defendants’ declarations indicate a
26 certain degree of variability from one HMC to the next that the court must take into account when
27 determining whether class certification or collective action certification is appropriate.
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1 LEGAL STANDARD

2 I. Motion for Class Certification

3 A party seeking to certify a class must satisfy the four prerequisites enumerated in Rule
4 23(a), as well as at least one of the requirements of Rule 23(b). Under Rule 23(a), the party seeking
5 class certification must establish: (1) that the class is so large that joinder of all members is
6 impracticable (i.e., numerosity); (2) that there are one or more questions of law or fact common to
7 the class (i.e., commonality); (3) that the named parties' claims are typical of the class (i.e.,
8 typicality); and (4) that the class representatives will fairly and adequately protect the interests of
9 other members of the class (i.e., adequacy of representation). Fed. R. Civ. P. 23(a). In addition to
10 satisfying these prerequisites, parties seeking class certification must show that the action is
11 maintainable under Rule 23(b)(1), (2) or (3). See Rule 23(b); Amchem Products, Inc. v. Windsor,
12 521 U.S. 591, 614 (1997). Rule 23(b)(3) permits class actions for declaratory or injunctive relief
13 where "the court finds that the questions of law or fact common to the members of the class
14 predominate over any questions affecting only individual members, and that a class action is
15 superior to other available methods for the fair and efficient adjudication of the controversy."

16 The party seeking class certification bears the burden of establishing that the requirements of
17 Rules 23(a) and 23(b) have been met. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180,
18 1188 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001); Hanon v. Dataproducts Corp., 976
19 F.2d 497, 508 (9th Cir. 1992). However, in adjudicating a motion for class certification, the court
20 accepts the allegations in the complaint as true so long as those allegations are sufficiently specific
21 to permit an informed assessment as to whether the requirements of Rule 23 have been satisfied.
22 See Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975). The merits of the class members'
23 substantive claims are generally irrelevant to this inquiry. Eisen v. Carlisle & Jacquelin, 417 U.S.
24 156, 177-78 (1974); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983).
25 However, courts are "at liberty to consider evidence which goes to the requirements of Rule 23 even
26 though the evidence may also relate to the underlying merits of the case," and a court may only
27 certify a class after a "rigorous analysis" as to whether the requirements have been satisfied. Hanon,
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976 F.2d at 509 (internal quotations omitted).

II. Motion for Certification of Collective Action

Employees may bring a collective action under the FLSA on behalf of similarly situated employees. 29 U.S.C. § 216(b); see also Leuthold v. Destination America, Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004) (Walker, J.). The court “may authorize the named FLSA plaintiffs to send notice to all potential plaintiffs and may set a deadline for those potential plaintiffs to join the suit.” Id.; see also Hoffmann-La Roche v. Sperling, 493 U.S. 165 (1989). Potential plaintiffs may file a written consent with the court to opt in to the suit. 29 U.S.C. § 216(b). Potential plaintiffs who do not opt in are not bound by the judgment and may bring a subsequent private action. Leuthold, 224 F.R.D. at 466 (citing EEOC v. Pan Am. World Airways, Inc., 897 F.2d 1499, 1508 n.11 (9th Cir. 1990)).

DISCUSSION

I. Rule 23 Class Certification

Plaintiffs seek to certify the following class: “all persons who worked as Home Mortgage Consultants outside the state of California for Wells Fargo Bank, N.A. at any time between July 1, 2001 and the present.” Plaintiffs bear the burden of showing that the proposed class satisfies all of the requirements of Rule 23(a) and at least one requirement of Rule 23(b).

A. Rule 23(a) Requirements

A party seeking class certification must establish that the numerosity, commonality, typicality and adequacy of representation requirements of Rule 23(a) have been met. The court addresses each of these requirements below.

1. Numerosity

Pursuant to Rule 23, the class must be “so numerous that joinder of all members is

1 impracticable.” Fed. R. Civ. P. 23(a)(1). Defendant acknowledges that the purported class includes
2 approximately 15,000 persons. Accordingly, plaintiffs have satisfied the numerosity requirement.

3
4 2. Commonality

5 To fulfill the commonality prerequisite of Rule 23(a)(2), plaintiff must establish that there
6 are questions of law or fact common to the class as a whole. Rule 23(a)(2) does not mandate that
7 each member of the class be identically situated, but only that there be substantial questions of law
8 or fact common to all. See Harris v. Palm Spring Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir.
9 1964). Individual variation among plaintiffs’ questions of law and fact does not defeat underlying
10 legal commonality, because “the existence of shared legal issues with divergent factual predicates is
11 sufficient” to satisfy Rule 23. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

12 Plaintiffs identify at least four common questions: (1) whether HMCs were properly
13 classified as “exempt” from federal overtime and time-recording statutes; (2) whether Wells Fargo’s
14 conduct emanated from California, and thus whether the UCL may be appropriately applied to the
15 class of nationwide plaintiffs; (3) whether Wells Fargo willfully failed to comply with the FLSA;
16 and (4) whether Wells Fargo acted in good faith in classifying HMCs as exempt. Plaintiffs
17 additionally claim that the affirmative defenses raised by defendant—exemption pursuant to the
18 “outside sales” exemption and exemption pursuant to the administrative exemption—involve the
19 common factual question of the HMCs’ primary duty. The administrative exemption defense further
20 raises the common question of whether HMCs are paid a salary pursuant to 29 C.F.R. section
21 541.200(a)(1). The outside sales exemption likewise raises the common factual issue of how certain
22 kinds of work are classified, for example, whether interacting with real estate agents and title
23 company employees outside the office constitutes sales activity.

24 Defendant argues that plaintiffs lack the requisite commonality due to the assertedly
25 individualized and factual nature of the inquiries regarding the experience of each particular HMC.
26 Apart from this general assertion, defendant largely conflates the commonality inquiry with the more
27 exacting predominance inquiry under Rule 23(b)(3). Accordingly, the court will discuss these issues
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1 in conjunction with the Rule 23(b)(3) analysis below.

3 3. Typicality

4 Under Rule 23(a)(3), the claims of the representative plaintiff must be typical of the claims
5 of the class. To be considered typical for purposes of class certification, the named plaintiff need
6 not have suffered an identical wrong. See Hanlon, 150 F.3d at 1020. Rather, the claims of the
7 putative class must be “fairly encompassed by the named plaintiff’s claims.” General Tel. Co. of the
8 Southwest v. Falcon, 457 U.S. 147, 156 (1982) (internal quotation omitted).

9 Regarding typicality, named plaintiffs Perez and Perry both purportedly had the same job,
10 same job duties, and were subject to the same company practices, policies and decisions that
11 affected their ability to earn overtime wages. Defendants argue that plaintiffs have presented
12 insufficient facts to establish that they adequately represent the 15,000 HMCs from the 1,600 Wells
13 Fargo locations at issue in the nationwide class. Paul v. WinCo Foods, Inc., No. CV 02-381-S-EJL,
14 2007 WL 1381794, at *4 (D. Idaho Feb. 16, 2007) (finding no typicality where the named plaintiffs
15 “represented only one of the eight Idaho stores and only two the eighteen California locations”
16 and had made only conclusory factual arguments in favor of typicality). Although “[t]he hurdle
17 imposed by the typicality requirement is not great,” named plaintiffs must show more than common
18 issues among themselves and the absent classmembers. Palmer v. Stassinios, 233 F.R.D. 546, 550
19 (N.D. Cal. 2006) (Whyte, J.).

20 Defendants additionally cite testimony from the named plaintiffs indicating their lack of
21 knowledge about the practices of other HMCs. Perez testified that he did not observe the comings
22 and goings of the prime HMCs in his office, and never visited any other Wells Fargo office. Perez
23 Dep. at 62:7–10, 64:18–65:8. Perry testified that he did not know what the other HMCs in his office
24 were doing based on the independent nature of each HMC’s business practice. Perry Dep. at
25 54:1–14.

26 In sum, the named plaintiffs are typical of the absent classmembers to the extent that they are
27 subject to the uniform compensation and employment policies that Wells Fargo applies to all HMCs.

1 However, they have not shown that they are typical to the extent that such typicality depends on
2 substantial similarities in day-to-day activities. In light of the fact that plaintiffs are challenging a
3 company-wide policy, however, the fact that the named plaintiffs and the absent class members
4 shared the same job title and were subject to the same policies at issue satisfies the typicality
5 requirement.

6
7 3. Adequacy

8 Rule 23(a)(4) dictates that the representative plaintiff must fairly and adequately protect the
9 interests of the class. To satisfy constitutional due process concerns, unnamed class members must
10 be afforded adequate representation before entry of a judgment which binds them. See Hanlon, 150
11 F.3d at 1020 (citing Hansberry v. Lee, 311 U.S. 32, 42–43 (1940)). “Adequate representation
12 ‘depends on the qualifications of counsel for the representatives, an absence of antagonism, a
13 sharing of interests between representatives and absentees, and the unlikelihood that the suit is
14 collusive.’” Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994) (quoting Brown v. Ticor Title Ins.
15 Co., 982 F.2d 386, 390 (9th Cir. 1992)).

16 Plaintiffs assert that the named plaintiffs have no known conflicts with members of the class
17 of HMCs and will fairly and adequately protect the interests of the class. Plaintiffs further claim that
18 their counsel is sufficiently experienced in class and collective actions nationwide regarding wage
19 and hour disputes to provide adequate legal representation to the class.

20 In response, defendant claims that the nationwide plaintiffs are inadequate representatives
21 because, as former employees, their interests are antagonistic to those of current HMCs. See
22 Southern Snack Foods, Inc. v. J & J Snack Foods Corp., 79 F.R.D. 678, 680 (D.N.J. 1978); Van
23 Allen v. Circle K Corp., 58 F.R.D. 562, 564 (C.D. Cal. 1972); Matarazzo v. Friendly Ice Cream
24 Corp., 62 F.R.D. 65, 68 (E.D.N.Y. 1974). Defendant has cited declarations from several non-
25 California HMCs stating that they prefer the commission-based system due to increased flexibility,
26 control over individual work responsibilities, and the direct correlation between amount of work and
27 compensation level. Allison Dec. ¶ 11; Bennet Dec. ¶ 12; Hailey Dec. ¶ 11; House Dec. ¶ 12; Logan
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1 Dec. ¶ 9; Ugan Dec. ¶ 14. As noted above, plaintiffs strenuously deny that the end result of a
2 successful class action lawsuit will be to eliminate Wells Fargo's commission-based compensation
3 structure, and therefore assert that these objections are irrelevant.

4 While courts have held that a former employee may not represent the best interests of current
5 employees where the relief sought may strain the employment relationship between current
6 employees and a defendant employer, defendant has identified no authority stating that former
7 employees are inadequate *per se*. Although the named plaintiffs in this action are primarily
8 concerned with a maximum financial recovery, a determination that current and former employees
9 are entitled to overtime compensation would likely lead to changes within Wells Fargo that would
10 benefit current employees going forward. In other words, defendants have not shown that current
11 employees would be harmed by a successful class action. Accordingly, the named plaintiffs satisfy
12 the adequacy requirement of Rule 23(a).

13
14 B. Rule 23(b)(3) Requirements

15 Class certification pursuant to Rule 23(b)(3) requires the plaintiff to establish that "the
16 questions of law or fact common to the members of the class predominate over any questions
17 affecting only individual members, and that a class action is superior to other available methods for
18 the fair and efficient adjudication of the controversy." The court will address each of these two
19 requirements separately.

20
21 1. Predominance

22 The predominance inquiry "focuses on the relationship between the common and individual
23 issues." Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244
24 F.3d 1152, 1162 (9th Cir. 2001). Consequently, the presence of common issues of fact or law
25 sufficient to satisfy the requirements of Rule 23(a)(2) is not by itself sufficient to show that those
26 common issues predominate. Hanlon, 150 F.3d at 1022. Nonetheless, "[w]hen common questions
27 present a significant aspect of the case and they can be resolved for all members of the class in a
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1 single adjudication, there is clear justification for handling the dispute on a representative rather than
2 on an individual basis.” Id. (internal quotations omitted); see also Culinary/Bartender Trust Fund,
3 244 F.3d at 1162. To establish predominance of common issues, a party seeking class certification
4 is not required to show that the legal and factual issues raised by the claims of each class member
5 are identical. Rather, the predominance inquiry focuses on whether the proposed class is
6 “sufficiently cohesive to warrant adjudication by representation.” Culinary/Bartender Trust Fund,
7 244 F.3d at 1162 (quoting Amchem, 521 U.S. at 623). Among the considerations that are central to
8 this inquiry is “the notion that the adjudication of common issues will help achieve judicial
9 economy.” Zinser, 253 F.3d at 1189 (quoting Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234
10 (9th Cir. 1996)).

11 Plaintiffs assert that the two main questions in this litigation are common to the class. It is
12 clear that the question of whether Wells Fargo’s conduct regarding exemption classifications
13 emanated from California is a common question, focusing only on the practices of a handful of
14 individuals within the company. However, plaintiffs further claim that the question of whether
15 HMCs are properly classified as exempt is common as well. Plaintiffs’ main point in support of this
16 contention is the fact that Wells Fargo uniformly treats all HMCs as exempt, regardless of any
17 purported variations in duties or work activities. Defendant does not deny that its HMC
18 compensation policy is uniform for all HMCs, and has confirmed that it does not maintain records of
19 hours worked by HMCs.

20 In the context of overtime pay litigation, courts have often found that common issues
21 predominate where an employer treats the putative classmembers uniformly with respect to
22 compensation, even where the party opposing class certification presents evidence of individualized
23 variations. For example, in Wang v. Chinese Daily News, 231 F.R.D. 602, 613 (C.D. Cal. 2005), the
24 court held that the defendant “cannot, on the one hand, argue that all [putative classmembers] are
25 exempt from overtime wages and, on the other hand, argue that the Court must inquire into the job
26 duties of each [putative classmember] in order to determine whether that individual is ‘exempt.’”
27 Two recent decisions from this district are in accord. In Tierno v. Rite Aid Corp., No. C 05-02520
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1 THE, 2006 WL 2535056 (N.D. Cal. Aug. 31, 2006) (Henderson, J.), an overtime class action
2 brought by store managers at Rite Aid, the court held that, given the fact that Rite Aid had
3 historically “treated all Store Managers as a homogenous group for the purposes of” the applicable
4 labor laws and “always categorically classified all Store Managers as exempt employees without
5 exception . . . Rite-Aid’s [sic] contention that each Store Manager position must now be individually
6 assessed to determine whether the position can be categorized as exempt or non-exempt rings
7 hollow.” Similarly, in Krzesniak v. Cendant Corp., No. C 05-05156 MEJ, 2007 WL 1795703 (N.D.
8 Cal. June 20, 2007) (Jenkins, J.), another manager overtime case, the court held that where a
9 putative class action plaintiff challenges a policy of classifying all employees of a given title as
10 exempt, the defendant cannot then argue that individualized inquiries into the job duties of each
11 employee are necessary to determine whether each employee is exempt.

12 It is undisputed that Wells Fargo’s compensation and exemption policy is uniform among all
13 HMCs. Plaintiffs have submitted evidence of other uniform policies regarding HMCs, such as
14 training, recruiting and job descriptions. Accordingly, plaintiffs have made a strong showing that, as
15 a general matter, common questions related to HMC experiences predominate over individual
16 variations. However, courts have recognized that the application of certain specific statutory
17 exemptions requires a highly individualized inquiry, and have resisted class certification on that
18 basis. See, e.g., Perry v. U.S. Bank, No. C-00-1799-PJH, 2001 WL 34920473 (N.D. Cal. Oct. 16,
19 2001) (Hamilton, J.). In Perry, the court denied certification of a class of personal bankers seeking
20 overtime compensation, based on the individual nature of the exemptions. Accordingly, the court
21 will consider the specific exemptions identified by defendant in order to determine whether these
22 exemptions raise predominant individual factual and legal issues.

23 24 2. Exemptions

25 Defendant identifies four federal exemptions in its opposition brief: (1) the outside sales
26 exemption, (2) the commissioned sales exemption, (3) the administrative exemption, and (4) the
27 highly paid exemption. The court will consider each exemption in turn.

a. Outside Sales Exemption

Under federal law, employees classified as “outside salespersons” are exempt from overtime requirements. 29 U.S.C. § 213(a)(1). An “outside salesman” is defined as an employee whose primary duty is “(I) making sales . . . , or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.” 29 C.F.R. 541.500(a). Additionally, “work performed incidental to and in conjunction with the employee’s own outside sales or solicitations . . . shall be regarded as exempt outside sales work.” 29 C.F.R. § 541.500(b). The United States Department of Labor has stated that the outside sales exemption may apply to “employees of finance companies who obtain and solicit mortgages.” Porter Dec., Exh. C.

Courts have acknowledged that “where liability to each plaintiff will depend on whether that plaintiff was correctly classified as an ‘outside salesman,’ the Court will be required to make a fact-intensive inquiry into each potential plaintiff’s employment situation” and that class certification may therefore be inappropriate. Clausman v. Nortel Networks, Inc., No. IP 02-0400-C-M/S, 2003 WL 21314065, at *4 (S.D. Ill. May 1, 2003). Defendant’s declarations suggest a wide variation among HMCs in terms of the amount of time spent on outside sales activities, depending on personal preference, experience, efficiency and reliance on support staff.

b. Commissioned Sales Exemption²

Federal law provides an exemption for any employee of a “retail or service establishment” where the employee’s regular pay rate exceeds one and one half times the minimum wage and “more than half his compensation for a representative period (not less than one month) represents commissions on goods or services.” 29 U.S.C. § 207(I). It is unclear whether Wells Fargo would qualify as a “retail or service establishment” for the purposes of this exemption. See Barnett v. Wa. Mut. Bank, FA, No. C 03-00753 CRB, 2004 WL 1753400, at *6 (N.D. Cal. Aug. 5, 2004) (Breyer,

J.) (holding that credit companies are not “retail or service establishments”); Gatto, 442 F. Supp. 2d at 541–42 (holding that a mortgage broker fit within the definition); see also Martin v. Refridgeration School, Inc., 968 F.2d 3, 5 (9th Cir. 1992) (“The meaning of the term ‘retail establishment’ is not obvious without further definition, and the statutory definition is of little assistance.”). In any case, the question of whether Wells Fargo is a “retail or service establishment” is common to the entire class and does not defeat class certification.

As with the outside sales exemption, a determination of liability pursuant to the commissioned sales exemption will require an individualized inquiry as to the amount and breakdown of each class member’s compensation, as well as the amount of time worked by each HMC.

c. Administrative Exemption

The FLSA additionally exempts employees employed in an administrative capacity from overtime requirements. 29 U.S.C. § 213(a). An administrative employee is defined as any employee

“(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”

29 C.F.R. § 541.200. The Department of Labor has stated that employees who service their employer’s financial services business by marketing, servicing and promoting financial products, advising customers and recommending products may fall within this exemption. Porter Dec., Exh. D. “However, an employee whose primary duty is *selling* financial products does not qualify for the administrative exemption.” 29 C.F.R. § 541.203 (emphasis added). In light of this authority, plaintiff has made a strong showing that the administrative exemption may be categorically inapplicable and therefore resolved on a class-wide basis. This favors class certification.

1 d. Highly Paid Exemption

2 As a final exemption, Wells Fargo claims that the HMCs are exempt under the federal statute
3 exempting highly compensated employees from overtime laws. Under federal law, “An employee
4 with total annual compensation of at least \$100,000 is deemed exempt under section 13(a)(1) of the
5 Act if the employee customarily and regularly performs any one or more of the exempt duties or
6 responsibilities of an executive, administrative or professional employee identified in subparts B, C
7 or D of this part.” 29 C.F.R. 541.601. This, again, will involve an individualized analysis not only
8 of job duties but of the dollar amount of each HMC’s compensation.
9

10 3. Conclusion as to Predominance

11 Taken together, defendants’ declarations have raised serious issues regarding individual
12 variations among HMC job duties and experiences. However, the common factual and legal issues
13 nonetheless predominate. Wells Fargo’s uniform policies regarding HMCs weighs heavily in favor
14 of class certification. As numerous courts have recognized, it is manifestly disingenuous for a
15 company to treat a class of employees as a homogenous group for the purposes of internal policies
16 and compensation, and then assert that the same group is too diverse for class treatment in overtime
17 litigation. This is particularly true in a situation such as this, where the difficulty of proving hours
18 worked and compensation received is exacerbated by defendant’s complete failure to maintain
19 pertinent records. Accordingly, plaintiffs have satisfied their burden and demonstrated that common
20 issues predominate.
21

22 4. Superiority

23 The final prerequisite for certification of a class under Rule 23(b)(3) requires the plaintiff to
24 show that a class action is superior to other methods available for the adjudication of the parties’
25 dispute. “Where classwide litigation of common issues will reduce litigation costs and promote
26 greater efficiency, a class action may be superior to other methods of litigation.” Valentino, 97 F.3d
27 at 1234. In considering whether a class action is superior, the court must focus on whether the
28

1 interests of “efficiency and economy” would be advanced by class treatment. Zinser, 253 F.3d at
2 1189 (internal quotations omitted). Relevant factors include:

3 (A) the interest of members of the class in individually controlling the
4 prosecution or defense of separate actions; (B) the extent and nature of
5 any litigation concerning the controversy already commenced by or
6 against members of the class; (C) the desirability or undesirability of
concentrating the litigation of the claims in the particular forum; (D)
the difficulties likely to be encountered in the management of a class
action.

7 Fed. R. Civ. P. 23(b)(3).

8
9 a. Case Management

10 Plaintiffs contend that a class action would be superior to individual actions because
11 representative litigation is particularly useful in suits by employees against an employer, and
12 because the various actions that have been previously filed against Wells Fargo regarding HMC
13 overtime compensation have already been consolidated as an MDL action. Defendant claims that
14 the myriad factual issues pertaining to each of the HMCs at each of the numerous Wells Fargo
15 locations throughout the country would make class action case management impracticable and
16 therefore inferior. Defendant further claims that it would be denied due process if the court made
17 determinations regarding a small number of HMCs and then extrapolated those results to the
18 thousands of class members, in light of the individualized analysis required before liability may be
19 determined. Additionally, defendant asserts that the “level of discord” among the putative class
20 members militates against certification. Plaintiffs were also given the names and contact
21 information of 500 putative class members, and have submitted only seventeen declarations in
22 support of their motion. Furthermore, at least one plaintiff is pursuing an FLSA claim individually.
23 Supp. Porter Dec., Exh. 4. Finally, at least some HMCs are content with the present arrangement
24 and would not support a lawsuit geared at altering Wells Fargo’s HMC compensation system.
25 However, plaintiffs insist that the current compensation arrangement would not be unduly disturbed
26 by a successful outcome for the plaintiffs, and this purported “discord” is therefore overstated.

27 As discussed above, many of the issues in this litigation focus on Wells Fargo’s policies and
28

1 practices, including whether any improper classifications were made willfully. Because individual
2 classmembers have little bearing on these issues, efficiency would be better served by trying these
3 issues on a class-wide basis. Furthermore, although many of the purported exemptions involve
4 individual factual inquiries, plaintiffs have raised categorical challenges to the application of these
5 exemptions which may be resolved on a class-wide basis. In light of the predominance of these
6 common issues over any individualized factual issues, considerations of case management favor
7 class treatment.

8
9 b. Alternative Remedies

10 Plaintiffs additionally claim that the existence of parallel “opt-in” claims under the FLSA do
11 not alter the desirability of class treatment for the UCL claims, as courts often certify concurrent
12 FLSA collective actions and UCL class actions at the same time. See, e.g., Romero v. Producers
13 Dairy Foods, Inc., 235 F.R.D. 474, 491 (E.D. Cal. 2006). Plaintiffs acknowledge, however, that
14 courts are hesitant to certify concurrent actions in this manner where there is substantial opposition
15 among potential class members to class treatment. Leuthold, 224 F.R.D. at 469–70. Although
16 defendant’s declarants have stated that they prefer a commission-based compensation system,
17 defendant has not shown that a successful class action would necessarily prevent commission-based
18 compensation, and therefore has not shown substantial opposition among potential class members.

19 Defendant claims that pendent state law claims, to the extent they are present in this action,
20 can be litigated as a separate FLSA opt-in action, and therefore class certification of the UCL claim
21 is unnecessary. See id. Defendant further claims that the individual potential recoveries are
22 sufficiently large that HMCs would pursue individual claims if desired.

23 While the existence of alternative remedies is a factor weighing against class certification,
24 the substantial predominance of common issues coupled with case management techniques tip the
25 balance in favor of class treatment. Plaintiffs have therefore shown that a class action is a superior
26 means of resolving this dispute.

1 C. Alternative Rule 23 Arguments

2 In the alternative to a Rule 23(b)(3) action, plaintiffs seek certification pursuant to Rule
3 23(b)(2) or Rule 23(c)(4)(A).

4
5 1. Rule 23(b)(2)

6 A party seeking certification of a class under Rule 23(b)(2) also bears the burden of
7 establishing that “the party opposing the class has acted or refused to act on grounds generally
8 applicable to the class, thereby making” injunctive relief appropriate. Fed. R. Civ. P. 23(b)(2).
9 Class actions certified under Rule 23(b)(2) are “not limited to actions requesting only injunctive or
10 declaratory relief, but may include cases that also seek monetary damages” where the claim for
11 injunctive relief is the primary claim. Probe v. State Teachers’ Ret. Sys., 780 F.2d 776, 780 (9th
12 Cir. 1986). Rule 23(b)(2) certification of a class seeking both injunctive relief and damages is
13 proper only where the claim for injunctive relief is the predominant form of relief sought by the
14 class. See Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 450–51 (N.D. Cal. 1994)
15 (Henderson, J.).

16 Plaintiff asserts that this action is suitable for Rule 23(b)(2) certification because a ruling that
17 defendants have improperly classified HMCs as exempt would amount to an injunction forcing
18 Wells Fargo to change its policies and practices, and that Wells Fargo could not continue to classify
19 its HMCs as exempt after such a contrary ruling.

20 In the employment context, courts routinely deny class certification under Rule 23(b)(2)
21 where the named plaintiffs are former employees and therefore will not benefit from any injunctive
22 relief. See, e.g., Jimenez v. Domino’s Pizza, Inc., 238 F.R.D. 241, 250 (C.D. Cal. 2006) (holding
23 that claims for monetary relief predominated where plaintiffs were “former employees and thus an
24 injunction as to Domino’s behavior to current employees cannot be Plaintiffs’ primary concern”);
25 Lanzarone v. Guardsmark Holdings, Inc., No. CV06-1136 RPLAX, 2006 WL 4393465, at *3 (C.D.
26 Cal. 2006) (holding that “certification cannot be granted under Rule 23(b)(2) because Plaintiff, a
27 former employee, lacks standing to pursue injunctive relief”); Sepulveda v. Wal-Mart Stores, Inc.,

1 237 F.R.D. 229, 245 (C.D. Cal. 2006) (holding that certification under Rule 23(b)(2) was not
2 available where approximately 1,200 out of roughly 2,750 class members, as well as the named
3 plaintiff, were former employees who would “derive no benefit from the injunction”). Here,
4 plaintiff is a former employee, and the proposed class definition explicitly envisions a certain
5 proportion of former employees. Accordingly, the predominant claims in this action are monetary,
6 and certification under Rule 23(b)(2) is not available.

7
8 2. Rule 23(c)(4)(A)

9 Rule 23(c)(4)(A) provides that, where appropriate, “an action may be brought or maintained
10 as a class action with respect to particular issues.” “The question of whether partial certification is
11 appropriate under Rule 23(c)(4)(A) is closely linked to the question of whether a class action is
12 superior to other available methods for the fair and efficient adjudication of the controversy.”
13 Sepulveda, 237 F.R.D. at 250 (internal quotations omitted). Plaintiffs assert that, if class
14 certification is unavailable under Rule 23(b)(2) or 23(b)(3), the court may certify a class for the
15 purpose of resolving any class-wide issues. Because the court has found that common issues
16 predominate over individual issues for the purposes of Rule 23(b)(3), certification under Rule
17 23(c)(4)(A) is inappropriate.

18
19 II. FLSA Collective Action

20 In addition to certification of a Rule 23 class, plaintiffs request a conditional certification of
21 the action as a representative collective action. Plaintiffs propose to bring a collective action on
22 behalf of “All persons who worked as Home Mortgage Consultants outside the state of California
23 for Wells Fargo Bank, N.A. at any time between February 17, 2003 and the present.”

24 The court’s determination of whether a collective action is appropriate is discretionary.
25 Leuthold, 224 F.R.D. at 466; see also Lusardi v. Lechner, 855 F.2d 1062, 1074–75 (3rd Cir. 1988).
26 Plaintiffs bear the burden of showing that they and the proposed class are similarly situated for
27 purposes of section 216(b). 29 U.S.C. § 216(b); see also Romero, 235 F.R.D. at 481. The term
28

1 “similarly situated” is not defined under the FLSA and the Ninth Circuit has yet to address the issue.
2 Id. District courts have taken three different approaches in interpreting the term “similarly situated”
3 for purposes of section 216(b): “(1) a two-tiered case-by-case approach, (2) the incorporation of the
4 requirements of Rule 23 of the current Federal Rules of Civil Procedure, or (3) the incorporation of
5 the requirements of the pre-1966 version of Rule 23 for ‘spurious’ class actions.” Id. This court
6 will follow the first approach adopted by the majority of courts, including three circuit courts.
7 Leuthold, 224 F.R.D. at 467; see, e.g., Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102-03
8 (10th Cir. 2001).³

9 The first step under the two-tiered approach considers whether the proposed class should be
10 given notice of the action. Leuthold, 224 F.R.D. at 467. This decision is based on the pleadings and
11 affidavits submitted by the parties. Id. The court makes this determination under a fairly lenient
12 standard due to the limited amount of evidence before it. Id. The usual result is conditional class
13 certification. Id. In the second step, the party opposing the certification may move to decertify the
14 class once discovery is complete and the case is ready to be tried. Id. If the court finds that the
15 plaintiffs are not similarly situated at that step, “the court may decertify the class and dismiss opt-in
16 plaintiffs without prejudice.” Id. The court addresses the first tier in this order.

17 Courts have held that conditional certification requires only that “plaintiffs make substantial
18 allegations that the putative class members were subject to a single illegal policy, plan or decision.”
19 Id. at 468; see also Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 406 (D.N.J. 1988). Under
20 this lenient standard, “the plaintiffs must show that there is some factual basis beyond the mere
21 averments in their complaint for the class allegations.” West v. Border Foods, Inc., No. 05-2525,
22 2006 WL 1892527, at *2 (D. Minn. July 10, 2006). Here, plaintiffs have shown that Wells Fargo’s
23 policy and practice related to HMC compensation is uniform for all putative classmembers.
24 Plaintiffs have also submitted declarations indicating a significant degree of commonality among the
25 experiences of HMCs. Although defendants raise substantial issues regarding the reliability of these
26 declarations, plaintiffs’ factual showing satisfies the lenient standard warranting conditional
27 certification of this collective action.
28

1 III. Concurrent Certification

2 In the event that this court certifies a collective action pursuant to the FLSA, defendant
3 asserts that the court should not certify a Rule 23 class action on that basis. Courts are hesitant to
4 certify concurrent actions where there is substantial opposition among potential class members to
5 class treatment. Leuthold, 224 F.R.D. at 469–70. However, defendant has not shown substantial
6 opposition to class treatment. Accordingly, the court sees no reason not to certify both actions.

7
8 CONCLUSION

9 For the foregoing reasons, plaintiffs' motion for class certification is GRANTED IN PART
10 and DENIED IN PART. Plaintiffs' motion to certify pursuant to Rule 23(b)(2) and Rule 23(c)(A)(4)
11 is DENIED. Plaintiffs' motion to certify pursuant to Rule 23(b)(3) is GRANTED. Plaintiffs'
12 motion to certify a collective action is GRANTED.

13 Within thirty (30) days of the date of this order the parties shall submit a form or forms of
14 class notice and other appropriate papers to facilitate this order. The Clerk of Court shall set a
15 further Case Management Conference within forty-five (45) days of this order.

16
17
18 Dated: October 17, 2007

19 
20 _____
21 MARILYN HALL PATEL
22 United States District Court Judge
23 Northern District of California
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ENDNOTES

1. A putative class of California plaintiffs is being represented by a separate lead plaintiff and counsel, and has moved separately for class certification. The putative class in the instant motion consists of plaintiffs from all states other than California, and will be referred to as “the nationwide plaintiffs.”
2. Defendant appears to raise this exemption in its opposition brief, but refers to it as the “inside sales exemption.” Defendant cites only one case in its cursory discussion of the “inside sales exemption,” a case dealing with the commissioned sales exemption. Gatto v. Specialists of Ill., Inc., 442 F. Supp. 2d 529 (N.D. Ill. 2006). The court will assume that defendant is referring to the commissioned sales exemption.
3. See also Hipp v. Liberty Nat. Life. Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001); Mooney v. Aramco Serv. Co., 54 F.3d 1207, 1213–14 (5th Cir. 1995).